NO. 87-2063

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CHARLES DANIEL . . . . . PETITIONER

v.

EATON CORPORATION, et al . RESPONDENT

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In his Petition for a Writ of Certiorari, Petitioner Charles Daniel respectfully asks that this Court answer a question upon which Courts of Appeals have expressed divergent opinions and has District Court judges in a

state of confusion: under what circumstances is a plaintiff, who seeks legal relief under the Employment Retirement Income Security Act of 1974, 29 U.S.C. §1001 et.seq. ("ERISA"), entitled (by the Seventh Amendment or otherwise), to a jury trial? In the case at bar, Charles Daniel was denied any administrative review of his entitlements and presented a clear de novo factual dispute in the United States District Court. Nonetheless, he was denied a jury trial.

ARGUMENTS

I. CONTARY TO THE STATEMENTS OF EATON IN ITS BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI, THE CIRCUIT COURTS OF APPEAL HAVE EXPRESSED DIVERGENT OPINIONS OVER THE AVAILABILITY OF A JURY TRIAL UNDER ERISA.

Respondent attempts to eliminate any conficts among the Courts of Appeal on this

issue primarily by citing a line of cases following Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981). However, Petitioner challenges this perception of harmony and will reveal that conflicting decisions have been rendered by the Second, Third, and Fifth Circuits. Even the Sixth Circuit in the opinion below leaves the door open for jury trials in some ERISA cases.

One such case Respondent cites is Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980), where the complainant asked for a declaration of future entitlements under a pension. The court correctly determined that such a claim was traditionally equitable and should be decided by a judge and not a jury. However,

"[w]hen the Fifth Circuit said 'that ERISA does not entitle the appellant [Calamia] to jury trial' (632 F.2d at 1237), it was not holding that no ERISA claims, even a purely legal claim, can ever require a jury trial. In Calamia, the Seventh Amendment is not mentioned once. In Calamia, the Fifth Circuit simply does not discuss the serious constitutional issue which would have been presented if Calamia's claim had been of the traditional 'legal' or 'common law' variety" (quoting Whitt v. Goodyear Tire & Rubber Co., 676 F. Supp. 1119, 1123 (N.D. Ala. 1987).

Petitioner disagrees with Respondent's assertion that Katsaros v. Cody, 744 F.2d 270 (2d Cir. 1984), cert. denied, sub nom., Cody v. Donovan, 469 U.S. 1072 (1984), is

controlling in the Second Circuit over two cases relied upon by Petitioner which grant jury trials in ERISA suits by beneficiaries for pension benefits: Pollock v. Castrovinci, 476 F. Supp. 606 (S.D.N.Y. 1979), aff'd without opinion, 622 F.2d 575 (2d Cir. 1980), and Paladino v. Taxicab Industry Pension Fund, 588 F. Supp. 37 (S.D.N.Y. 1984). Rather, Katsaros serves only to highlight the conficting opinions on this issue in the Second Circuit. Pollock cannot be reconciled with Katsaros "without acknowledging that Katsaros deals only with a claim for equitable relief. The Katsaros court said:

> There is no right to a jury trial of ERISA actions against pension fund trustees seeking the equitable remedy of restitution.

744 F.2d at 278 (quoting from Whitt at 676 F. Supp. at 1123). Whitt continues to state that

"[i]n Pollock, which was certainly not overruled by Katsaros, the Second Circuit had previously said:

> The litmus test for determining the right to a jury trial is whether the nature of the legal issues to be tried is 'legal' or 'equitable.'

476 F. Supp. at 608" (quoting from Whitt at 676 F. Supp. 1123).

Additional evidence of conflict is apparent in Abbarno v. Carborundum Co., 682 F. Supp. 179, 181 (W.D.N.Y. 1988), (beneficiaries could demand a jury trial because their claim was essentially legal), which notes that Katsaros "did not state that the claims therein involved and the claims in Pollock v. Castrovinci...were equitable simply because they were ERISA claims.... [I]t seems more appropriate to read Katsaros as establishing a

rule that ERISA actions can be tried to a jury provided the particular ERISA claim at hand is legal in nature...."

In Paladino, Judge Brient "refused to believe that congressional silence on the jury right issue in ERISA 'reflects an intention that suits for pension benefits by disappointed applicants are equitable.'" 588 F. Supp. at 40 (quoting from Wardle at 627 F.2d at 829).

Respondent's suggestion that Turner v. CF&I Steel Corp., 770 F.2d 43 (3d Cir. 1985), cert. denied, 474 U.S. 1058 (1986), shows unity on this issue is in error. In Turner, the Third Circuit:

> expressly adopted the defendant's reading of Wardle v. Central States, Etc., in its decision not to allow a jury trial in an ERISA action. The statement in Turner... that the...Second Circuit has held that jury trials are not available under subsection [502](a)(1)(B) cannot be supported.... [T]he Second Circuit did not go so far as to say that jury trials are not

> inappropriate in all ERISA actions. Absent some clearer statement from such court or from the United States Supreme Court regarding this issue, this Court opines that some ERISA actions maybe appropriately tried to a jury.

Abbarno, at 682 F. Supp. at 181. Further, even in the decision below, the Sixth Circuit acknowledged in Daniel v. Eaton, that "there may be actions under ERISA in which a jury trial is proper." 839 F.2d 263, 268 (6th Cir. 1988).

II. Divergent Opinions On This Issue And The "ERISA Quicksand" Necessitates A Clear Decision By The Supreme Court Concerning Petitioner's Right To A Jury Trial.

An analysis of the ERISA jury trial issue overlaps with the recurring question of the extent and effects of ERISA's pre-emption of state law claims.

This Court's recent decision in Mackey v. Lanier Collections Agency & Service, Inc.,

56 U.S.L.W. 4631 (No. 86-1387, June 17, 1988); further clarified the broad pre-emption provision of §514(a) of ERISA, 29 U.S.C. §1144(a), under which ERISA pre-empts all state laws which "relate to" any employee benefit plan, even if they are consistent with the substantive provisions of ERISA. District Court Judge Acker has referred to this widening" scope of pre-emptions as the "ERISA quicksand", Jordan v. Reliable Life Insurance Co., No. 88-AR-0543-S, Slip op. at 9 (N.D.Ala. Sept. 8, 1988), which has engulfed previous state law remedies.

The decisions reached by some courts in ruling there is no right to a jury trial in an ERISA cases are strangely inconsistent with the central policy goal of ERISA to "protect-...plan participants in employee benefit plans

and their beneficiaires...by providing appropriate remedies, sanctions, and ready access to the federal courts." Southern California Meat Cutters Unions and Food Employees Pension Fund v. Investors Research Co., 687 F. Supp. 506 (C.D.Cal. 1988) (citing 29 U.S.C. §1001(b). In addition, the matter is further complicated by the fact that ERISA does not expressly address the jury trial issue. Therefore, judges at both District and Court of Appeals levels are in turmoil, and are often "torn between [their] duty to dance to the beat of the nearer drum sounded by [their circuit] in a case directly on point, and [their] court's duty to dance to the beat of the Supreme Court's louder, more powerful drum in a non-ERISA case dealing more broadly with

the Seventh Amendment's guarantee of a jury trial in any congressionally-created cause of actions in which the creating statute is silent as to the right to a jury trial of a traditionally jury-type claim." Jordan, No. 88-AR-0543-S, Slip. op. at 10. Clearly, ERISA should be interpreted to expand, not limit the scope of recovery allowable to participants, by permitting a jury to resolve issues of fact, lest pre-emption actually serve to strip the beneficiary of the right to have a jury resolve factual issues.

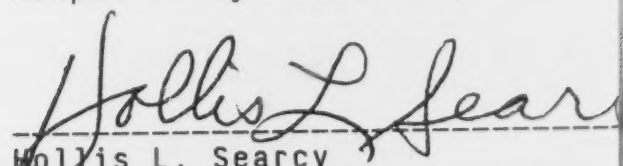
Interestingly, the Whitt court commented that "[w]hile ERISA pre-empts state law claims, it does not preclude concurrent state court jurisdiction over ERISA claims. As yet, neither Congress nor any federal court has

instructed any state court that it may not try an ERISA dispute without a jury." 676 F. Supp. at 1131-32.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the Reply to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was sent by regular U.S. mail, postage prepaid, to Harry T. Quick, BENNETT, FRIEDLANDER, COPLAN & ARNOFF, 1100 Citizens Building, 850 Euclid Avenue, Cleveland, Ohio 44114, this 22nd day of September, 1988.

Hollis L. Searcy